DATE: MARCH 26, 1996

CASE NO: 94-INA-638

In the Matter of

AGRO INTERNATIONAL, INC.
Employer

on behalf of

ANA VIRGINIA MARTINEZ
Alien

Before: Jarvis, Huddleston and Vittone
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Agro International, Inc.'s ("Employer") request for review of the U.S. Department of Labor Certifying Officer's ("CO") denial of a labor certification application. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On April 12, 1993, the Employer filed a Form ETA 750, Application for Alien Labor

Certification, with the Florida Department of Labor and Employment Security on behalf of the Alien, Ana Virginia Martinez. The job opportunity was listed as "Verification Specialist - Commercial Notations," and the position required two years of experience in the job offered and two years of experience in the related occupation of "General Cashier - Financial Institution." AF 67. No specific academic credentials were required. AF 67.

Six individuals responded to Employer's advertisements and notices. AF 65-66. On June 4, 1993, the Employer sent a form letter to the five applicants it found qualified for the position, inviting them to interview.[1] The letter included the following language:

> At the time of the interview, we will require the following to be presented: . . . . a certify [sic] copy of your university academic transcript (if your academic credentials are granted by a university that is not a United States university, you must provide a certify [sic] copy of an evaluation of your academic credentials by and [sic] approved academic evaluation service) . . . .

AF 74. In response to the recruitment, the Employer stated that four of the five applicants were rejected because they did not respond to its letter. AF 78-81. The remaining applicant scheduled an interview, but later cancelled. AF 75. Employer's application was therefore sent to the CO on August 11, 1993. AF 52-53.

In a Notice of Findings ("NOF") dated November 8, 1993, the CO proposed to deny the application on several grounds, including (1) that the Employer had not engaged in a good faith recruitment effort, and (2) that the Employer's advertisement was unacceptable. AF 46-51. The CO indicated that the letter the Employer sent to interested U.S. applicants, requiring that they bring a certified copy of their university transcript to the interview, had a "discouraging effect" on U.S. workers because the request was burdensome and because the position does not require any specific educational background. In addition, the CO stated that the Employer had not documented that it had requested the same information from the Alien. The CO also indicated that the employer's job announcement, which highlighted the word "Title" instead of the actual title of the job ("Verification Specialist - Commercial Notations"), had a "chilling effect" on U.S. workers because U.S. applicants interested in this type of job would not look for it under the heading "Title." As a corrective action, the Employer was required to rebut and re-advertise.

The Employer submitted its rebuttal on December 8, 1993. AF 14-45. The Employer made several arguments in response to the CO's allegation that it had not engaged in a good faith recruitment effort. First, although the Employer acknowledged that the advertised position did not require any specific academic requirement, it stated that it had requested university transcripts:

> in order to determine whether the applicant, via a combination of education, training, and experience, qualified for the position offered, based on the minimum requirements for the position offered, as stated by the employer at Item #14 on Form ETA 750A and in the advertisements announcing the job opportunity.

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[1] One of the six applicants did not meet the minimum amount of work experience required for the position. AF 77.

AF at 20-21.

Second, although the Employer acknowledged that it had not requested documentation of the Alien's educational credentials, the Employer indicated that this was "because no specific academic requirement is required for the position and because the alien fulfills the minimum requirements for the position offered." AF 23-24. Finally, the Employer argued that requiring this documentation did not place a great burden on U.S. workers and that no U.S. worker was rejected solely because he or she failed to provide the requested documentation. AF 21-22. In regard to its advertisement, the Employer argued that its advertisement clearly stated the job title as "Verification Specialist-Commercial Notations" and is therefore in compliance with the applicable regulations. AF 39-43.

The CO denied labor certification in his February 2, 1994 Final Determination (FD). AF 12-13. The CO indicated that the Employer had not shown that it was necessary for applicants to provide it with their university academic credentials and that this requirement had had a "chilling effect" on U.S. workers. In this regard, the CO pointed out that four of the six U.S. workers who had applied for the position did not respond to the Employer's letter. The CO also indicated that the Employer's advertisement of the position under the title "Title," instead of the actual title, had a "chilling effect" on U.S. workers.

The Employer filed a request for review and a supporting brief on March 2, 1994. AF 1.

DISCUSSION

Although not explicitly stated, a "good faith" requirement in regard to post filing recruitment is implicit in the regulations. *H.C. La March Ent., Inc.,* 87-INA-607 (Oct. 27, 1988). Actions by the employer that do not show a good faith recruitment effort or that prevent qualified U.S. workers from further pursuing their applications are therefore a basis for denying certification. *Oriental Healing Arts Institute,* 93-INA-75 (September 26, 1994). In such circumstances, the employer fails to show that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work. *Id.*; 20 C.F.R. §656.1.

The Board has held that where an applicant's resume raises a reasonable possibility that he or she is qualified for the job, an employer bears the burden of further investigating the applicant's credentials. *Gorchev & Gorchev Graphic Design,* 89-INA-118 (Nov. 29, 1990)(*en banc*). As noted in *Gorchev,* the employer's burden of further investigation can be accomplished by "interview or other means." And panels of the Board have held that under certain circumstances, such other means may include sending the applicant a written request for clarifying information. For a general discussion of the use of written interrogatories, see *Bobco Metals Company,* 92-INA-372 (May 18, 1994). However, whatever means are employed by the employer, they may not place unnecessary burdens on the recruitment process, *Lin and Associates,* 88-INA-7 (Apr. 14, 1989) (*en banc*), be dilatory in nature, *Berg & Brown, Inc.,* 90-INA-481 (Dec. 26, 1991), or otherwise have the effect of discouraging U.S. applicants, *Vermillion Enterprises,* 89-INA-43 (Nov. 20, 1989).

In the present case, the Application for Alien Labor Certification and the Employer's advertisement indicated that the position did not require any specific academic credentials. The Employer's letter to the U.S. applicants, however, required that they bring their university transcript to their interview. We find that this letter placed excessive demands on the applicants and added an unstated requirement, namely, a university education. *Therapy*

Connection, 93-INA-129 (June 30, 1994); *Rysan, Inc.*, 94-INA-606 (Sept. 12, 1995). The letter, therefore, effectively discouraged qualified U.S. applicants from pursuing the position. *Id.* Indeed, only one of the five applicants who received the letter responded to it. Accordingly, the CO appropriately denied certification.

In view of this determination, the job title issue need not be discussed.

ORDER

The denial of alien labor certification is AFFIRMED.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

DBJ/mg/bg